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**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

Paper No. 18
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **BRAINYBRAWN.COM, INC.**

Serial No. 75/823,864

Myron Amer of Myron Amer, P.C. for **BRAINYBRAWN.COM, INC.**

Verna Beth Ririe, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney).

Before **Seeherman, Hohein** and **Rogers**, Administrative Trademark
Judges.

Opinion by **Hohein**, Administrative Trademark Judge:

BRAINYBRAWN.COM, INC. has filed an application to
register the mark "BRAINYBRAWN" for services identified by
amendment as "educational services, namely, conducting classes,
seminars, conferences and workshops in the field of mind, body
and soul health considerations."¹

¹ Ser. No. 75/823,864, which was filed on October 15, 1999, on the
basis of an allegation of a bona fide intention to use such mark in
commerce. A statement of use, alleging a date of first use anywhere
and in commerce of October 30, 2000, subsequently was filed on
November 6, 2000.

Registration has been finally refused on the ground that the specimen of use is unacceptable because it fails to show the mark "BRAINYBRAWN" used or displayed in the sale or advertising of the services recited in the application as amended. Sections 1(a)(1), 3 and 45 of the Trademark Act, 15 U.S.C. §§1051, 1053 and 1127; Trademark Rules 2.56(a) and 2.88(b)(2); and TMEP Section 1301.04. Specifically, the Examining Attorney maintains in her final refusal that "the specimen must show the mark in reference to the particular services identified" and that, in this case, because "[t]he specimen submitted does not mention or refer to any ... educational services," applicant is required to "submit a specimen that shows use of the mark for the services identified in the application," namely, "conducting classes, seminars, conferences and workshops in the field of mind, body and soul health considerations."

In addition, registration has been finally refused on the basis that the declaration submitted with the statement of use is unacceptable "because the declarant has not signed it." In particular, the Examining Attorney asserts that while "the declaration statements are allegedly made by Naresh Belwal" (applicant's president), "the declaration is signed by Myron Amer" (applicant's attorney). The Examining Attorney, therefore, made final a "requirement that the applicant submit a

substitute declaration" signed by "[t]he party making the declaration."

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusals to register.

Turning first to the refusal on the ground that the specimen of use filed with the statement of use does not show use of the mark "BRAINYBRAWN" in connection with the educational services recited in the amended application, we note that such specimen consists of a print-out of what appears to be the homepage of applicant's website. The specimen features the term "BRAINYBRAWN," located in the upper left-hand corner of the page underneath a circular logo formed from three crescents, used in connection with references to "Breaking News" and "Recent Health Topics" on the subject of "Alternative Medicine" and includes advertising of "Featured Products" available through applicant's "online store." Appearing near the bottom of the page is the instruction "Contact Us 1-877-920-6430," which is followed by the statement: "Information presented at BrainyBrawn is for educational purposes only; statements about products and health conditions have not been evaluated by the U.S. Food & Drug Administration."

Whether a mark has been used for a particular service or services is a question of fact which is determined on the

basis of the specimen or specimens of use submitted in connection with the application. See, e.g., In re Advertising & Marketing Development Inc., 821 F.2d 614, 2 USPQ2d 2010, 2015 (Fed. Cir. 1987) and TMEP Section 1301.04. Applicant "contends that the statement that information presented at applicant's BrainyBrawn web site is for EDUCATIONAL SERVICES cannot be any more of a direct showing of the mark to the services" (capitalization in original). Applicant also argues that:

On a somewhat indirect showing, but a sufficient showing nevertheless, is the instruction on the specimen "Contact [U]s 1-877-920-6430" in the proximity of the text titled "Breaking News" and "Recent Health Topics".

The instruction sets in motion, at the least, a phone conference, and the recitation of applicant's services is "...conducting... conferences...in the field of mind, body and soul health considerations."

Applicant insists, in view thereof, that the telephone number appearing on its webpage is not included, as the Examining Attorney maintains, merely as a "contact number." Instead, applicant urges with respect to calls to such number that, "if applicant answers these calls, doesn't the oral exchange between callers and applicant qualify as a 'conference', and [if so] wouldn't such conferences be of the 'Breaking News' and 'Recent Health Topics' recited in the specimen"? Applicant accordingly asserts that "the specimen advertises the services that

applicant recites that it renders and, to any reader of the specimen, a fair reading is that applicant provides the educational services recited." Notably, however, applicant offers no explanation as to how the specimen specifically demonstrates use of the mark "BRAINYBRAWN" in connection with the other educational services for which it seeks registration, namely, the conducting of classes, seminars and workshops in the field of mind, body and soul health considerations.

We agree with the Examining Attorney that the specimen fails to show use of such mark for the services recited in the application. As the Examining Attorney accurately and persuasively observes in her brief:

[T]here is no reference [in the specimen] to any educational services in the form of classes, seminars, conferences or workshops being conducted by the applicant. The only reference to "educational" is at the bottom of the page where, below a reference to a telephone contact number the specimen contains the statement that "[i]nformation presented at BrainyBrawn is for educational purposes only."

The specimen of use submitted by the applicant shows use of the mark in connection with a website that facilitates on-line retail store services of health products and provides information on topics related to health. The specimens do not show use of the mark in connection with any "classes, seminars, conferences or workshops."

....

The specimen merely indicates that the applicant offers news and information on health topics and products. The specimen's reference to "educational" is not to suggest the applicant offers "educational services," but rather is used as a disclaimer that the information presented on the applicant's web site is for educational purposes only as it has not been evaluated by the U.S. Food & Drug Administration. There is no representation the applicant offers "educational services." The specimen provides no evidence of any groups, meetings, instructors, or schedules incidental to educational services. There is no information regarding enrollment for any classes, seminars, conferences or workshops. There is no advertising of any such classes, seminars, conferences or workshops.

Moreover, with respect to applicant's remaining contention that any oral exchange resulting from telephone calls to the contact number listed on applicant's webpage amount to an educational "conference," we concur with the Examining Attorney, as further noted in her brief, that:

The specimen does not support such a reading of the significance of a telephone contact number. The reference to the telephone number is merely given as a "contact" number. The applicant makes no representation that a customer or client will have the opportunity to "conference" with an individual regarding the recited health topics.

A service mark specimen must show use of the mark in the sale or advertising of the services. 37 C.F.R. 2.56(b)(2). The specimen submitted by the applicant makes no reference to a class, seminar, conference or workshop. These are the particular

educational services for which the applicant has applied to ... [register] its proposed mark and these are the services for which use must be shown on a specimen of use.

Accordingly, the refusal on the ground that the specimen does not evidence use of the "BRAINYBRAWN" mark in connection with the services recited in the application is well taken.

As to the other issue in this appeal, the declaration in question states in its entirety that:

NARESH BELWAL declares: That he is President of applicant corporation and has authorized Myron Amer, as attorney, to execute this declaration on behalf of said corporation; that Naresh Belwal believes said corporation to be the owner of the service mark sought to be registered and entitled to use the mark in commerce; that to the best of his knowledge and belief, no other person, firm, corporation or association has the right to use said mark in commerce, either in the identical form or in such near resemblance thereto as may be likely, when applied to the services of such other person, to cause confusion, or to cause mistake, or to deceive; that the mark was first used in advertising in intrastate and interstate commerce at least as early as October 30, 2000, and is still in use in such commerce; that the mark is used for "Educational services, namely, conducting classes, seminars, conferences and workshops in the field of mind, body and soul health considerations", there being submitted herewith a specimen showing the manner in which the mark is used; that all statements made herein of his own knowledge are true and that all statements made on information and belief are believed to be true; and further, that these statements were made with the knowledge that willful false statements and the like so made are

punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or document or any registration resulting therefrom.

The declaration is signed on behalf of "BRAINYBRAWN.COM, INC." by "MYRON AMER, as Attorney." Mr. Amer was appointed by applicant's president as applicant's attorney in the power of attorney executed as part of the application as originally filed.²

Applicant, while incorrectly citing Trademark Rule 2.76(b)(1) (which pertains to requirements for a complete amendment to allege use) rather than Trademark Rule 2.88(b)(1) (which governs requirements for a complete statement of use),³ argues that, as stated in the declaration, its attorney, Myron Amer, was given authority by applicant's president, Naresh Belwal, to execute the declaration on behalf of applicant. In particular, applicant contends that "Naresh Belwal as applicant's president is the logical fact witness to provide the declaration statements subject to the sanctions of Section 1001 of 18 U.S. Code, but ... the actual signing has been properly

² Such power of attorney appoints Mr. Amer "to prosecute this application, to transact all business in connection therewith, and to receive the Certificate."

³ It is nonetheless pointed out that in substance the two provisions are essentially identical, with the only difference being that the former makes reference to the "application" while the latter refers to the "notice of allowance."

delegated to Myron Amer." As to the Examining Attorney's contention that the person identified as the declarant must also sign the declaration (or conversely, the person who signs the declaration must be the declarant), applicant asserts that:

The dilemma this presents is that Myron Amer, although given the authority[,] is not conversant with the facts so that he can sign off as a fact witness. Nor is it good practice for an attorney of record to also function as a fact witness. Certainly if the registration is subsequently involved in litigation, Myron Amer could not be both the litigation attorney and also a trial fact witness.

The Examining Attorney, on the other hand, correctly recognizes in her brief that, "in lieu of a verified statement to support an application or statement of use, an applicant may submit a declaration signed by a person who is properly authorized to sign on behalf of the applicant" and that such a person can include "an attorney who has an actual or implied written or verbal power of attorney to sign on behalf of the applicant." She maintains, however, that it is still a "basic principle that a 'declaration' must be signed by a 'declarant,' meaning the person who makes the statement. See, e.g., Federal Rule of Evidence 801(b)."

According to the Examining Attorney, the declaration submitted with applicant's statement of use is unacceptable because (footnotes omitted):

The applicant's attorney herein attempts to sign a declaration for which he makes no statement. Rather, he is relying on a statement made by "Naresh Belwal." If the declaration is made by Naresh Belwal, then it must be signed by Naresh Belwal. In the alternative, the applicant was advised that an attorney with the proper power of attorney from the applicant may provide such a statement. However, the attorney must make the statement as required by the ... [Trademark Rules of Practice]. There is no provision to relieve an attorney declarant from the basic principles of being a "declarant." Pursuant to Trademark ... [Rule] 2.33, an attorney may be properly authorized to sign on behalf of an applicant. However, Trademark ... [Rule] 2.20 requires that the person who signs the declaration ("the undersigned") make this declaration.

The declaration statements allegedly made by Naresh Belwal are not supported by Mr. Belwal's signature. The declaration is therefore insufficient as a verified declaration under Trademark ... [Rules] 2.20 and 2.33. Inasmuch as Trademark ... [Rule] 2.88(e) requires a signed statement and verification or declaration within the statutory period for filing the statement of use, the refusal to register ... should be maintained.

We concur with the Examining Attorney that the declaration submitted by applicant with its statement of use is unacceptable because it has not been signed by the declarant. Trademark Rule 2.88(b)(1) provides that a complete statement of use must include:

A statement that is signed and verified (sworn to) or supported by a declaration under §2.20 by a person properly authorized

to sign on behalf of the applicant (see §2.33(a)) that:

(i) The applicant believes it is the owner of the mark; and

(ii) The mark is in use in commerce, specifying the date of the applicant's first use of the mark in commerce, and those goods or services specified in the notice of allowance on or in connection with which the applicant uses the mark in commerce.

Trademark Rule 2.33(a), entitled "Verified statement," requires that:

The application must include a statement that is signed and verified (sworn to) or supported by a declaration under §2.20 by a person properly authorized to sign on behalf of the applicant. A person who is properly authorized to sign on behalf of the applicant is:

(1) a person with legal authority to bind the applicant; or

(2) a person with firsthand knowledge of the facts and actual or implied authority to act on behalf of the applicant; or

(3) an attorney as defined in §10.1(c) of this chapter who has an actual or implied written or verbal power of attorney from the applicant.

Trademark Rule 2.20, which relates to "Declarations in lieu of oaths," states that:

Instead of an oath, affidavit, verification, or sworn statement, the language of 28 U.S.C. 1746, or the following language, may be used:

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the

application or document or any registration resulting therefrom, declares that all statements made of his/her knowledge are true; and all statements made on information and belief are believed to be true.

As indicated in TMEP Section 804.04 (*italics in original*):

Effective October 30, 1999, the Trademark Act does not specify the appropriate person to sign on behalf of an applicant. The definition of a "person properly authorized to sign on behalf of an applicant" is set forth in 37 C.F.R. §2.33(a). This definition applies to applications for registration, amendments to allege use, statements of use, 37 C.F.R. §§ 2.76(b)(1), 2.88(b)(1) It also applies to declarations supporting ... use of substitute specimens

....

The broad definition of a "person properly authorized to sign on behalf of an applicant under 37 C.F.R. §2.33(a) applies *only* to verifications of facts by the applicant and designations of domestic representatives. It does not apply to powers of attorney, revocations of powers of attorney, responses to Office actions, or consent agreements.

The above rules, along with the quoted section of the TMEP, clearly contemplate that the declarant and the signer of the declaration must be the same person. Thus, while Trademark Rule 2.33(a) provides that an attorney may qualify as "[a] person who is properly authorized to sign on behalf of the applicant," if an attorney executes a statement of use on behalf

of an applicant so as to meet the requirements of Trademark Rule 2.88(b)(1) that the statement be "signed and verified (sworn to) or supported by a declaration under §2.20 by a person properly authorized to sign on behalf of the applicant," then the attorney must also be the person who, under such rule, is the declarant who states that (i) the applicant believes it is the owner of the mark and (ii) the mark is in use in commerce, specifying the date of the applicant's first use of the mark in commerce, and those goods or services specified in the notice of allowance on or in connection with which the applicant uses the mark in commerce. Specifically, in the case of a statement of use which is supported by a declaration under Trademark Rule 2.20, it is the person who signs such declaration who, as properly noted by the Examining Attorney, constitutes the "undersigned" under such rule and who "declares that all statements made of his/her knowledge are true; and all statements made on information and belief are believed to be true." Consequently, if the declaration accompanying the statement of use is signed by an attorney, then it is the attorney who additionally must be the declarant and make the averments required by Trademark Rule 2.88(b)(1); plainly, an attorney may not verify statements if the attorney has no personal knowledge, which is the case herein as applicant's attorney candidly admits.

Accordingly, because the declarant, which as set forth in the statement of use furnished by applicant is its president rather than its attorney, has not properly signed the declaration submitted in support of applicant's statement of use, the refusal to register is well taken.

Decision: The refusals to register are affirmed.